Filed 8/21/12 Logerot v. County of Los Angeles CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

CATHERINE LOGEROT, Plaintiff and Appellant, v. COUNTY OF LOS ANGELES et al., Defendants and Respondents.	B232702 (Los Angeles County Super. Ct. No. BC414886)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard E. Rico, Judge. Affirmed.

Law Offices of Leo James Terrell and Leo James Terrell, for Plaintiff and Appellant.

Lawrence Beach Allen & Choi and Michael D. Allen, for Defendants and Respondents.

I. INTRODUCTION

Plaintiff, Catherine Logerot, appeals from a summary judgment entered on her California Fair Employment and Housing Act violations (Gov. Code,[1] § 12940 et seq.) and intentional emotional distress infliction complaint. The summary judgment was entered in favor of defendants, the County of Los Angeles (the county) and one of its employees, defendant, Joseph Morien, a Los Angeles County Deputy Sheriff. Plaintiff alleged she was injured during an interview for a position as a deputy sheriff when Deputy Morien asked a number of inappropriate questions of a sexual nature. We affirm.

II. PROCEDURAL HISTORY

A. The Complaint

The complaint alleges that, after applying to be a deputy sheriff, plaintiff was interviewed by Deputy Morien in April 2008. During the interview, he allegedly asked her harassing and discriminatory questions based on her gender. The questions had no relationship to the position for which she was applying. They were: "Are you aggressive in the bedroom?"; "Have you had sex with a minor?"; and "How old were you when you first had sex?" Deputy Morien attempted to discourage plaintiff from seeking to be hired and denied employment to her despite her qualifications. The complaint contains causes of action for: sexual harassment (first); gender discrimination (second); and intentional emotional distress infliction (third).

---

[1] All further statutory references are to the Government Code unless otherwise indicated.

B. The Summary Judgment Motion

Defendants filed a summary judgment motion on the grounds: the questions were nondiscriminatory background investigative queries which are protected by discretionary immunity under section 820.2; there could be no recovery under the Fair Employment and Housing Act for occasional, isolated, sporadic or trivial questions and comments; there is no liability for gender discrimination against an individual; the undisputed evidence showed that the county did not discriminate against plaintiff on the basis of her gender given she withdrew her employment application; further, more females than males were hired as deputy sheriffs in 2008 and 2009; and no extreme and outrageous conduct occurred.

In support of the motion, Lieutenant Vance Duffy, declared that during the pertinent times of this action he was a sergeant assigned to the Personnel Administrations Bureau's Backgrounds Unit. Lieutenant Duffy's job included supervising 12 investigators, 1 of whom was Deputy Morien. Lieutenant Duffy trained the investigators and ensured that they followed the sheriff's personnel policies and procedures including instilling each member with its core values. The core values provide, "I commit myself to honorably perform my duties with respect for the dignity of all people, integrity to do right and fight wrongs, wisdom to apply common sense and fairness in all I do and courage to stand against racism, sexism, anti-Semitism, homophobia and bigotry in all its forms." There are numerous written policies in place consistent with the core values of preventing sexual harassment and gender discrimination according to Lieutenant Duffy. The sheriff's department strives to achieve a diverse work force. And, in 2008 and 2009, greater percentages of female applicants were hired compared to male applicants for the same position.

Lieutenant Duffy never had a complaint about Deputy Morien's interviewing techniques or job performance. No person other than plaintiff ever filed a complaint against Deputy Morien on the basis of gender discrimination or sexual harassment. Prior to filing the administrative complaint and government tort claim, plaintiff did not

complain to anyone in the Personnel Administrations Bureau's Backgrounds Unit about the April 28, 2008 interview.

Deputy Morien had been employed by the sheriff's department since 1990. He was assigned to personnel administration in 2007. He conducted background investigations of no less than 500 applicants, 150 of whom were women. Other than plaintiff, no applicant has ever complained that Deputy Morien engaged in sexual harassment or gender discrimination. He has been rated by his supervisors as "outstanding." He considered his job assignment as an aid to avoiding future liability for misconduct by deputies by screening candidates regarding drug use, sexual history and criminal misconduct.

When conducting interviews, Deputy Morien typically used a 17-page questionnaire. The questionnaire covers personal data, criminal behavior, traffic violations, electronic communications, personal conduct, narcotics use, employment and military history and financial background. Depending on an applicant's responses to the questions, Deputy Morien will ask related follow-up questions. The interviews normally take two to three hours to complete. During the interview, Deputy Morien will explain to the applicant a process to put the application on hold rather than withdrawing it completely. This would be used where the applicant feels he or she may not clear the process or has other reservations. If the applicant decides to withdraw from the process, Deputy Morien asks them to fill out a form stating the reasons.

After the background interview and a successful background check, Deputy Morien passes the application on to a supervisor. The supervisor makes the decision about whether to hire the applicant. Deputy Morien does not hire nor does he make recommendations about hiring the applicants. In March 2008, plaintiff completed an 11-page pre-investigative questionnaire and a 16-page questionnaire. Deputy Morien reviewed these materials prior to the background interview. Deputy Morien conducted plaintiff's background interview in April 2008.

Deputy Morien asks a number of questions that were targeted to ascertain whether applicants have engaged in sexual misconduct that might impact their qualifications as a

deputy. The questions are sensitive and personal but are necessary for a thorough screening. He asks both male and female applicants: about indecent public exposure and sex in public places; about the scope of any pornographic materials viewed or purchased; and how old they were when they first had sex. Deputy Morien did not deny that he asked plaintiff whether she ever exposed herself in public, including while driving to Las Vegas. But he declared, depending on the applicant's responses to the questionnaire and in the background interview, he will ask follow-up questions. He typically asks, "Have you ever had sex in a public place or in public view?" Because an applicant sometimes does not understand what qualifies as a "public place," Deputy Morien will specify such environments. This includes movie theaters, public restrooms, beaches, or a parked car on a public street. He will also ask whether the applicant has ever publicly exposed himself or herself such as while driving.

Deputy Morien did not recall asking plaintiff whether her husband had ever watched pornographic materials. But Deputy Morien conceded it was possible he did ask such a question. Deputy Morien's objective was to ascertain whether plaintiff also watched it and whether any of it included child pornography in the household. Deputy Morien asked about plaintiff's age the first time she had sex because applicants do not often know the definition of statutory rape. This question allows him to obtain the information about the applicant's as well as the partner's age. Deputy Morien denied that he asked plaintiff whether she was "aggressive" in the bedroom. He also denied making a remark that a prior applicant he interviewed had been a lesbian.

After completing the questioning, Deputy Morien informed plaintiff about the academy and expectations placed on a new deputy. This included assignment to a custody facility for a year or two. Plaintiff asked if she would be assigned to a female facility. Deputy Morien advised plaintiff that deputies have no control over their assignment. Many female deputies are assigned to men's jail facilities. And, new deputies may be assigned to early morning "graveyard" or night shifts. Plaintiff said her marriage and young child caused some concern about being able to devote the time to becoming a deputy. Plaintiff stated she would be unable to work early morning

"graveyard" shifts because of her child. In accordance with his usual practice, Deputy Morien advised plaintiff that she could "sign off" and temporarily put the application on hold. This would be done in lieu of completely withdrawing the application. Plaintiff signed and dated a form on April 28, 2008 which withdrew the application. The form stated: "I am denying the position because I am no longer interested at this time. My family comes first, and I am not able to provide the time needed for this career." Deputy Morien denied that he instructed her on what to write on the form. He would not ever threaten or coerce an applicant to fill out the form. He did not do so with plaintiff. Because plaintiff withdrew her application, the department did not make a decision whether to hire her. Plaintiff and Deputy Morien had no other contact after the background interview was completed.

Defendants also produced plaintiff's deposition responses in support of the summary judgment motion. Plaintiff admitted Deputy Morien: did not ask her on a date; made no suggestions that he wanted to engage in sexual acts with plaintiff; made no comments about plaintiff's looks; and did not talk to her about any of his own sexual conduct. Plaintiff's sexual harassment claim is based in part on questions asked by Deputy Morien as: to whether she ever had sex in a public place or exposed herself in a public place; to whether her husband had ever watched pornography; and how old she was when she first had sex. Plaintiff admitted in her deposition that she checked "yes" on the pre-investigative questionnaires that she had sex in a public place or in public view. Plaintiff admitted at her deposition she did not complain to anyone at the department about the interview questions.

Plaintiff could not remember specifically telling Deputy Morien that she did or did not want to sign the form on April 28, 2008 withdrawing her employment application. Plaintiff admitted that she never told anyone at the department she wanted to withdraw her application or was still interested in becoming a deputy. Plaintiff's application paperwork showed she had previously committed an act of theft and used several illegal drugs. Prior to applying for the department, plaintiff had applied for law enforcement jobs but was never hired.

C. Summary Judgment Opposition

Plaintiff opposed the summary judgment making a number of evidentiary objections to defendants' separate statement of undisputed facts. Plaintiff also asserted that the following additional facts precluded summary adjudication of the issues. Plaintiff scored well on the written test. After passing the written exam, plaintiff had a half-hour interview. No questions regarding her sexual history were asked. Plaintiff was then given a packet to fill out background information. After she returned the completed package, she had a brief interview. No questions of her sexual history were asked.

At the beginning of the April 28, 2008 interview, Deputy Morien asked plaintiff "Are you aggressive in the bedroom?" During the course of the interview, he asked questions about her sexual history. Deputy Morien asked her if her husband watched pornography and if she had ever flashed herself driving down the freeway from Las Vegas. When asked if she and her husband have sex in bathrooms in their spare time, she said "No." Deputy Morien then stated: "Well, I don't know. You might like to be one of those girls that does it to get caught." When asked how old she was when she first had sex, he told her: "Don't worry. I won't tell anybody. I'm not passing judgment on you."

Deputy Morien did not ask the questions of any other applicants male or female. There are no department documents, writings, memos, or e-mails authorizing Deputy Morien to ask the sexual questions he asked plaintiff. Deputy Morien's supervisor, Lieutenant Duffy, did not authorize the questions.

Deputy Morien also had a discussion with plaintiff about a polygraph test. He told her that a lesbian was once interviewed. The woman was "dinged" on the polygraph when she was asked a question about her sexuality. He said he had his own skeletons in the closet but was not subjected to a polygraph test. This was because when he was hired they were not mandated.

According to plaintiff, at the end of the interview, Deputy Morien told her to fill out the "sign-off" sheet. He told her to state that she had family obligations that prevented her from going forward. When she questioned him about why she should write

this, he stated, "You put what I tell you to put." Plaintiff was surprised by the sign-off sheet. Up to that point, she was told she was not disqualified and nothing negative was going to happen to her. Deputy Morien said, "This is what you're going to do." Plaintiff replied: "That's not really what I want to write down. I don't understand." Plaintiff responded, "Just write what I'm telling you to write." Deputy Morien never told her she had a choice to not sign the form. Plaintiff surrendered, signed the document and left in tears. Deputy Morien said to her: "Don't make me feel worse than I already do. Good luck." Plaintiff denied telling Deputy Morien she did not feel she would be able to devote the time required to be a deputy. Plaintiff's family supported her decision to apply to the department. Deputy Morien admitted in his deposition that plaintiff did not have any issues which would prohibit her from being hired. Plaintiff did not receive an employee handbook or policy manual during the application process concerning sexual harassment or misconduct complaints.

D. Reply to the Opposition

Defendants replied to the opposition by asserting plaintiff's separate statement was non-responsive and failed to cite specific admissible evidence. Defendants argued that they were not requesting the interview questions be sanctioned or allowed. Rather, plaintiff's intentional emotional distress infliction claim had no merit because she could not recover for occasional, isolated or sporadic conduct. (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1042-1043.) And, even if all the questions were asked, they are insufficient as a matter of law to prove a sexual harassment claim. The evidence offered by plaintiff does not establish Deputy Morien could not ask certain questions. But even if he lacked authority to do so, as a matter of law, the conduct was not sufficiently pervasive to constitute sexual harassment or intentional infliction of emotional distress.

E. The Summary Judgment Ruling

The trial court initially summarily adjudicated the harassment and discrimination claims in defendants' favor. However, the trial court rejected defendants' section 820.2 immunity defense. With respect to the sexual harassment claim, the trial court ruled: plaintiff is required to show the conduct was severe in the extreme; defendants showed the conduct was a single occasion over several hours; and plaintiff failed to produce evidence that the conduct was not an isolated incident. The trial court ruled plaintiff failed to prove gender discrimination because the undisputed evidence showed no adverse employment action was taken as she withdrew her employment application. To the extent plaintiff claimed she withdrew the application under duress, she did not make the department aware of the claim until after litigation was filed. The trial court then refused to summarily adjudicate the intentional infliction of emotional distress claim. However, in compliance with our alternative writ of mandate (*County of Los Angeles v. Superior Court* (Nov. 8, 2010, B228250 [nonpub. order])), the trial court summarily adjudicated the emotional distress claim against plaintiff. After judgment was entered, plaintiff filed this timely appeal.

III. DISCUSSION

A. Standard of Review

In *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850-851, our Supreme Court described a party's burdens on summary judgment or adjudication motions as follows: "[F]rom commencement to conclusion, the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law. That is because of the general principle that a party who seeks a court's action in his favor bears the burden of persuasion thereon. [Citation.] There is a triable issue of material fact if, and only if, the evidence would

allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof. . . . [¶] [T]he party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact. . . . A prima facie showing is one that is sufficient to support the position of the party in question. [Citation.]" (Fns. omitted, see *Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 877-878.) We review the trial court's decision to grant the summary judgment motion de novo. (*Coral Const., Inc. v. City and County of San Francisco* (2010) 50 Cal.4th 315, 336; *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 65, 67-68.) The trial court's stated reasons for granting summary judgment are not binding on us because we review its ruling, not its rationale. (*Coral Const., Inc. v. City and County of San Francisco*, *supra*, 50 Cal.4th at p. 336; *Continental Ins. Co. v. Columbus Line, Inc.* (2003) 107 Cal.App.4th 1190, 1196.) In addition, a summary judgment motion is directed to the issues framed by the pleadings. (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1252; *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 673, overruled on a different point in *Reid v. Google* (2010) 50 Cal.4th 512, 527, fn. 5.) Those are the only issues a motion for summary judgment must address. (*Conroy v. Regents of University of Cal.* (2009) 45 Cal.4th 1244, 1249-1250; *Goehring v. Chapman University* (2004) 121 Cal.App.4th 353, 364.)

B. Sexual Harassment

The Fair Employment and Housing Act prohibits an employer from discriminating based on sex in terms of compensation or workplace conditions. (§ 12940, subd. (a).) In addition, it is an unlawful employment practice to "harass an employee" because of sex. (§ 12940, subd. (j)(1).) Section 12940, subdivision (j)(4)(C) provides that "harassment" because of sex includes sexual and gender harassment. Consistent with Title VII of the

Civil Rights Act of 1964 (42 U.S.C. § 2000e-2(a)(1)), California recognizes two forms of sexual harassment. The first is quid pro quo harassment where a term of employment is conditioned on submission to unwelcome sexual advances. The second form of harassment arises from severe or pervasive conduct which creates a hostile work environment. (*Hughes v. Pair*, *supra*, 46 Cal.4th at p. 1043; *Haberman v. Cengage Learning, Inc.* (2009) 180 Cal.App.4th 365, 378.)

Plaintiff contends she established a prima facie case of hostile work environment sexual harassment. A prima facie claim of sexual harassment for hostile work environment requires proof: plaintiff was subjected to unwelcome sexual advances, conduct or comments; the behavior was based on sex; and the behavior was sufficiently severe or pervasive to alter the conditions of employment and created an abusive work environment. (*Lyle v. Warner Bros. Television Productions* (2006) 38 Cal.4th 264, 278; accord *Hughes v. Pair*, *supra*, 46 Cal.4th p. 1048.) But, not all sexually coarse, offensive or vulgar language in the workplace is actionable under the Fair Employment and Housing Act. (*Hughes v. Pair*, *supra*, 46 Cal.4th at p. 1049; *Lyle v. Warner Bros. Television Productions*, *supra*, 38 Cal.4th at pp. 273-274.) Instead, our Supreme Court has explained the test for actionable conduct for hostile work environment sexual harassment only arises when the totality of the circumstances shows the harassing behavior is pervasive or severe. (*Miller v. Dept. of Corrections* (2005) 36 Cal.4th 446, 462; accord *Hughes v. Pair*, *supra*, 46 Cal.4th at p. 1043; *Lyle v. Warner Bros. Television Productions*, *supra*, 38 Cal.4th at p. 283.) Factors to be considered in the pervasiveness determination are: the conduct's frequency; the severity; whether it is physically threatening or humiliating or a mere offensive utterance; and whether it reasonably interfered with work performance. (*Lyle v. Warner Bros. Television Productions*, *supra*, 38 Cal.4th at pp. 283-284; *Miller v. Dept. of Corrections*, *supra*, 36 Cal.4th at p. 462.) By contrast, recovery is denied when the harassment is only occasional, isolated or trivial. (*Hughes v. Pair, supra*, 46 Cal.4th at p. 1043; *Lyle v. Warner Bros. Television Productions*, *supra*, 38 Cal.4th at p. 283.) When the conduct involves nothing more than a few isolated incidents, the employee must prove that the conduct was "'severe'" in the

extreme. (*Hughes v. Pair, supra*, 46 Cal.4th at p. 1043; *Lyle v. Warner Bros. Television Productions, supra*, 38 Cal.4th at p. 284.)

The undisputed evidence established that during the background interview, Deputy Morien asked plaintiff a number of unwelcome sexually based questions. And, defendants did not dispute that the language was sexual and private in nature. Nevertheless, defendants met their summary judgment burden by showing there was no merit to the sexual harassment claim because the severe and pervasive element could not be established. (Code Civ. Proc., § 437c, subds. (a), (o)(1); *Lyle v. Warner Bros. Television Productions, supra*, 38 Cal.4th at p. 286.) Rather, the undisputed evidence shows an isolated incident over the course of several hours in which approximately 10 questions of a sexual nature were asked. Under the totality of the circumstances, Deputy Morien's conduct was not "severe in the extreme" under the aforementioned standards. Plaintiff cannot prevail on the hostile work environment sexual harassment claim.

C. Gender Discrimination

Plaintiff contends the trial court erred in summarily adjudicating her gender discrimination cause of action. Generally, a prima facie case of gender discrimination requires proof: plaintiff is a member of a protected class; she was qualified for the position she sought; she suffered an adverse employment action; and some other circumstances suggesting a discriminatory motive. (*Guz v. Bechtel Nat., Inc.* (2000) 24 Cal.4th 317, 355; *Jones v. Dept. of Corrections and Rehabilitation* (2007) 152 Cal.App.4th 1367, 1379.) Our Supreme Court has explained: "[A]n employer is entitled to summary judgment, if, considering the employer's innocent explanation for its actions, the evidence as a whole is insufficient to permit a rational inference that the employer's actual motive was discriminatory." (*Guz v. Bechtel Nat., Inc., supra*, 24 Cal.4th at p. 361.)

To begin with, given the sensitivity of employment as a deputy sheriff, these are neutral nondiscriminatory inquiries. Deputy Morien's inquiries were pertinent to

potential violations of law including illegal pornography possession and public sexual misconduct. Peace officers are held to high standards of conduct. (*Pasadena Police Officers Assn. v. City of Pasadena* (1990) 51 Cal.3d 564, 571-572; *Upland Police Officers Assn. v. City of Upland* (2003) 111 Cal.App.4th 1294, 1302; see *Bardin v. Lockheed Aeronautical Systems Co.* (1999) 70 Cal.App.4th 494, 500-501.) The inquiries were neutral nondiscriminatory questions which the undisputed evidence indicates Deputy Morien asked of others. Considering the risks and benefits, such questions of peace officer candidates is at least an act to which section 820.2 immunity applies. (*Caldwell v. Montoya* (1995) 10 Cal.4th 972, 989; *Johnson v. State of California* (1968) 69 Cal.2d 782, 794, fn. 8.)

In any event, the issue here is whether plaintiff raised a triable issue of material fact that gender played a role in the department's decision not to hire her. Deputy Morien did not make the hiring decision. Plaintiff admitted that she never communicated to the department that she wanted to withdraw the sign-off document. She also admitted that she could not remember whether she told Deputy Morien that she did not want to sign the document. Nothing in this evidence would allow an inference the employer's actions in not hiring her were more likely than not based on gender discrimination. (*Guz v. Bechtel Nat., Inc.*, *supra*, 24 Cal.4th at p. 357; see also *Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at pp. 850-851.)

D. Intentional Infliction of Emotional Distress

Plaintiff claims the intentional infliction of emotional distress claim was sufficient. The elements of this cause of action are: the defendant's outrageous conduct; intentional or reckless disregard of the probability of causing emotional distress; the plaintiff suffered severe or extreme emotional distress; and the defendant's outrageous conduct was the actual and proximate cause of emotional distress. (*Davidson v. City of Westminster* (1982) 32 Cal.3d 197, 209; *Johnson v. Ralphs Grocery Co.* (2012) 204 Cal.App.4th 1097, 1108.) Our Supreme Court has explained it has set a "high bar" on the

severe emotional distress requirement. (*Hughes v. Pair*, *supra*, 46 Cal.4th at p. 1051; *Kelley v. The Conco Companies* (2011) 196 Cal.App.4th 191, 215.) The required emotional distress is that which is of such substantial or enduring quality that no reasonable person in a civilized society should be expected to endure it. (*Hughes v. Pair*, *supra*, 46 Cal.4th at p. 1051; see also *Haberman v. Cengage Learning, Inc.*, *supra*, 180 Cal.App.4th at p. 389.) Deputy Morien's alleged conduct did not exceed all bounds that is usually tolerated in a civilized society. (*Hughes v. Pair*, *supra*, 46 Cal.4th at p. 1051; see also *Haberman v. Cengage Learning, Inc.*, *supra*, 180 Cal.App.4th at p. 389.)

IV. DISPOSITION

The judgment is affirmed. Defendants, the County of Los Angeles and Joseph Morien, are awarded their costs on appeal from plaintiff, Catherine Logerot.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P. J.

We concur:

ARMSTRONG, J.

KRIEGLER, J.